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COLLATERAL ATTACK ON INCORPORATION.

B. IN GENERAL.

IN a former article[1] dealing with unauthorized corporate action, by hypothesis, (1) the associates had made an attempt to incorporate, resulting in a colorable corporate organization; (2) there was a law authorizing the formation of such a corporation as was attempted; (3) there had been user of some of the powers which such a corporation would possess; and (4) the persons seeking to prevent collateral attack had acted in good faith. This article deals with unauthorized corporate action when some one or more of these conditions are lacking. It also, preliminarily, inquires more fully into the nature of the question underlying the whole subject of unauthorized corporate action.

The law deals with rights, and the corresponding obligations. Every right belongs to a legal unit or units; every obligation binds a legal unit or units.

A human being is, in the nature of things, a unit. A philosopher might entertain a doubt upon this, — *homo* might seem to him merely a convenient word by which to designate a large number of molecules. But the common law judges seem never to have doubted.

A human being may be so circumstanced that the courts do not find it proper to recognize him or her as a legal unit for some, or any, purpose. Thus of slaves, monks, aliens, traitors, lunatics,

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[1] 20 HARV. L. REV. 456.

infants, and married women. But, usually, a human being will be recognized as a legal unit.

Two or more persons may unite to accomplish a common purpose. Thus is formed a gild, a partnership, a college, a church, a club. Will these persons, so united, be recognized by the courts as a legal unit?

Undoubtedly, if the sovereign has authorized them to act as a unit. Persons so authorized are said to be incorporated. A corporation *de jure* may be defined as a body of persons legally authorized to act as a unit.[1]

But suppose the sovereign has not authorized them. Two questions arise: is there anything, in the nature of things, which prevents the associates from in fact acting as a unit, or which prevents the courts from recognizing them as a legal unit? Are there sufficient reasons of policy to deter the courts from recognizing such a body as a legal unit?

For centuries the leading case on corporations in England was the Case of Sutton's Hospital.[2] The king, at the petition of Sutton, had granted a charter for the purpose of incorporating the master and governors of a hospital to be founded by Sutton. Sutton thereafter purported to convey land to such corporation. His heir contended that there was no corporation, and that the conveyance was void, but the court held both the incorporation and the deed to be valid.

One objection raised by the heir was that "until there be an actual hospital and poor in it, there cannot be governors of them, for governors ought not to be idle, or as cyphers in algebra."[3] The court held that the incorporation of the persons might well precede the foundation of the hospital. We find this language: "And it is great reason that an hospital, &c, in expectancy or intendment, or nomination, should be sufficient to support the name of an incorporation when the corporation itself is only *in abstracto*, and rests only in intendment and consideration of the law; for a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law. . . . They cannot

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1 A corporation sole is a term, not altogether happy, but established by usage, indicating a person some of whose rights and liabilities are permitted by law to pass to his successors in a particular office, rather than to his heirs, executors, or administrators. Such a "corporation" was unknown in the civil law. This article deals with corporations aggregate.

2 10 Coke 1, 23 (1612).

3 *Ibid.* 23 *b*.

commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney. . . . A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person nor swear."[1] And, on another point, the report runs: "If the King gives licence to grant to the Mayor and Commonalty of Islington, it is void where there is not any such incorporation, although the inhabitants of Islington be afterwards incorporated by the name of Mayor and Commonalty, because there was no such corporation *in rer' natura* at the time of the grant."[2]

Blackstone followed Coke: A corporation aggregate "must always appear by attorney, for it cannot appear in person, being, as Sir Edward Coke says, invisible and existing only in intendment and consideration of law. It can neither maintain, nor be made defendant to, an action of battery or such like personal injuries; for a corporation can neither beat nor be beaten, in its body politic. . . . It cannot be executor or administrator, or perform any personal duties; for it cannot take an oath for the due execution of the office."[3]

Notwithstanding the great respect due to any language used by Coke and Blackstone, it is submitted that the conception of a corporation as an invisible being, existing only in intendment of law, makes for confusion.

A number of men unite to accomplish a common purpose. This body is authorized by the sovereign to act as a unit. There is nothing *in rerum natura* after such authority has been given which was not there before. There is no mysticism about incorporation. The sovereign's charter does not work magic, calling forth a metaphysical being.

When the reasons of policy against recognizing a married woman as a legal unit gave way, the courts, in henceforth recognizing her as a legal unit, did not bring a new thing *in rerum naturam.*

The conclusions which Coke and Blackstone drew from their conception of a corporation have, in the main, ceased to be law.

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[1] 10 Coke 32 *b.*

[2] *Ibid.* 27 *b.* In Bank *v.* Allen, 11 Vt. 302, counsel for defendant spoke of a plea of *nul tiel corporation* as equivalent to a plea of *nul tiel persona in rerum natura.*

[3] 1 Bl. Comm. 476. Marshall, C. J., used similar language in Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 636. In a later case, Bank *v.* Dandridge, 12 Wheat. (U. S.) 64, he held (in a dissenting opinion) that an oral contract cannot be binding upon a corporation, because a corporation has no voice.

The notions that a corporation cannot commit a trespass upon the person and cannot be an executor are altogether exploded.

In the nature of things, units may be so associated together as to form a new unit. The biologist speaks of composite units. Persons, by their own voluntary action, may unite, may in fact form a new, a composite, unit, quite without the sovereign's charter. The charter authorizes what was before unauthorized; it does not make possible what was before impossible.

From very early times the courts have recognized some unchartered bodies of persons as legal units. These bodies were called corporations of common right, or corporations at the common law. Thus the unchartered parishioners of a church were, for some purposes, a corporation at the common law.[1] A corporation at the common law is not to be confounded with a corporation by prescription. If a particular body of men and their predecessors have long acted as a corporation, such long user lays a foundation for the presumption that the sovereign had in ancient times granted them a charter, and that this has been lost. But the parishioners of a particular church did not need to show that they, or their predecessors, had long acted as a corporation. It was enough that it was the common usage for parishioners of any church so to act. There were, then, certain unchartered bodies of persons which were recognized by the courts as legal units; the doctrine is treated as clearly established by both Littleton and Fineux.[2] Now, if the courts could recognize as legal units some unchartered bodies of persons, they could have so recognized all such bodies. They did not refuse to recognize some unchartered bodies as legal units because of any obstacle arising out of the nature of things.

In New Orleans Co. *v.* Louisiana[3] *quo warranto* was brought

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[1] See Y. B., 11 Hen. IV, 12; Y. B., 37 Hen. VI, 30; Y. B., 8 Edw. IV, 6; Co. Lit. 3 *a;* Finch's Law, c. XVII; Keilw. 32 *a;* 2 P. Wms. 125; 4 Vin. Abr. 525. For the purposes of this article it would be unprofitable to inquire whether the corporation was, strictly, the whole body of the parishioners, or only the wardens of the church. In Y. B., 12 Hen. VII, 27, Fineux, C. J., *held* that the parishioners are a corporation at common law for the purpose of protecting the goods of the church, but are not a corporation for other purposes. There had been a note in Y. B., 10 Hen. IV, 3, to the same effect.

[2] Y. B., 20 Edw. IV, 2 (per Littleton); Y. B., 14 Hen. VIII, 2 (per Fineux).

There is also evidence tending to show that, in early times, the Court of Exchequer, in revenue matters, allowed unchartered bodies of men to be sued, and even to sue, as a unit. Madox, Firma Burgi, 85, 91.

[3] 180 U. S. 320.

in a state court against the X company, and judgment was rendered that such company had never been legally incorporated. The individuals associated in the company were not named as parties in the proceeding; the company was the sole defendant, being served in the method required for service upon a corporation. And the federal court held this procedure to be proper. If a body of men, not authorized by the sovereign to act as a unit, cannot in fact act as a unit, and cannot be treated by the courts as a legal unit, who was the defendant in this proceeding?

We conclude that there is nothing in the nature of things which prevents a body of persons, unauthorized by the sovereign to act as a unit, from in fact acting as a unit. Legal units are such units in fact as the courts see fit to recognize as legal units, — any unit in fact *may* be so recognized. There is therefore nothing in the nature of things which prevents a court from recognizing as a legal unit a body of persons unauthorized by the sovereign to act as a unit, but in fact acting as a unit.

Are there sufficient reasons of policy to prevent the courts from recognizing such a body as a unit?

Madox states that "anciently a Gild either Religious or Secular could not legally be set-up without the Kings Licence. If any Persons erected a Gild without Warrant, that is, without the Kings leave, it was a Trespass, and they were lyable to be punished for it. For example. In the Twenty-sixth year of K. Henry II (1179), several Gilds in London were amerced to the Crown as Adulterine, that is, as set-up without Warrant from the King."[1]

In his chapter "*De Libertates*" Bracton puts the case that the king should grant some liberty "ut si alicui universitati, sicut civibus vel burgensibus vel aliquibus aliis q. mercatum habeant."[2] It appears, from the chapter as a whole, that he considered this liberty, or franchise, together with various other liberties, to be under the control of the king ("in manu sua"); and that private persons might enjoy it, "sed de gratia ipsius Regis speciali."

Y. B., 49 Edw. III, 3 (1375). A devised lands to B for life, remainder "a deux des meliour homes de la Guild de la Fraternity de Whitawyers en Londres" forever. A died without heirs, and on the death of B the king claimed the land by escheat. The court held that the devise (after B's life estate) was void. Belknap expressed his opinion that, even if the devise had been to "the

[1] Firma Burgi, 26.

[2] Lib. II, c. 24, fol. 56.

Fraternity," it would not have been good, because the commonalty of London cannot by their own act create a community within the community without the charter of the King. . . . A Fraternity is not a term known to the law, nor can a community exist without a charter.[1] Knyvet, Chancellor, with greater precision of thought, said that this commonalty of the gild, which is not confirmed by the king, could not be adjudged a body capable of taking an estate by purchase.[2]

Y. B., 20 Edw. IV, 2 (1480). B, alderman of the X gild, brought debt against C, and counted upon an obligation made to A, sometime alderman of the gild, and his successors. Objection that the plaintiff had not shown how the corporation was formed. Objection sustained. Littleton took a distinction between a "corporation of common right" and a gild. The judges were all of opinion that, if suit could be maintained, it would be by the executor of A, and counsel for the plaintiff finally remarked that he had told his client so in the beginning.[3]

In Y. B., 14 Hen. VIII, 2 (1522), Fineux remarked: "There is a corporation by the Pope alone, as those mendicant brothers who cannot purchase." But Brooke, writing after the Reformation, laid it down that if the Pope purports to create a corporation, "ideo ceo est usurpation et voyd a cest jour et fuit imperpetuum."[4]

These authorities show that from a very early date the sovereign asserted that he, and he alone, could lawfully authorize men to act as a unit. Action by a number of men as a unit, without his authority, was an encroachment upon his prerogative.

In the main, this assertion was supported by the courts. A gild, in many respects, was like a modern town,[5] and it is easy to see why the courts should acquiesce in the sovereign's assertion of control over such bodies. And the law with respect to gilds became the law generally. The doctrine of corporations at the common law was confined within narrow limits — was regarded as an histor-

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1 "Le commen de Londres ne poet my d'eux mesme faire comen deins cest comen sans chartr le Roy. . . . Fraternity n'est my terme de ley, ne comen ne puit my estre sans chre."

2 "Il ne poet pas estre p. la ley q. c. cominalty de la Guilde, q. n'est affirme p. chre le Roy, purroit etre adjudgee un corps de purchace estate."

3 See also Y. B., 22 Edw. IV, 34.

4 1 Brooke, Abr. Corp., 33. See, accord, Dyer 81, pl. 64.

5 "And it was well observed, that in old time the inhabitants or burgesses of a town or borough were incorporated when the King granted to them to have *gildam mercatorium*." 10 Coke 30 *a*. And see Madox, Firma Burgi, 29.

ical exception to the general rule. The claim by the city of London of a right to incorporate was never sanctioned; the claim of the Pope was certainly not sanctioned after the Reformation. We find Blackstone laying it down that the sovereign's consent is absolutely necessary to the erection of any corporation. Such consent, he explains, is implied with respect to corporations at the common law.[1]

In the United States the courts have taken a position similar to that of Blackstone.[2] It has been accepted, as clear and long-settled law, that, without the consent of the state, corporate action is unauthorized.

It follows that if the state complains, in a *quo warranto* or similar proceeding, of unauthorized corporate action, the courts will grant the state appropriate relief. This is clear law.

But suppose that the state does not complain. Ought the courts to allow the question of legal incorporation to be raised collaterally? Is the assumption of the corporate privilege equivalent to a grant of the corporate privilege until the state intervenes?

To put a concrete case. The associates assume to act as a corporation without making any attempt to comply with any law regulating the formation of corporations. They style themselves a corporation, and adopt the forms of procedure usually followed by corporations *de jure*. A contracts with them as a corporation. On a breach of the contract A seeks to hold the associates to full liability, and they seek to confine A to a remedy against the assets, if any, of the corporation.

A contract, say the associates, is a consensual transaction. Out of a consensual transaction can arise only such obligations as the parties intended to arise. We agreed to be bound as a corporation, but we did not agree to be bound as individuals. To bind us

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[1] 1 Bl. Comm. 460.

[2] Corporations at the common law have been but rarely mentioned in American corporate law. The validity, however, of a corporation aggregate at the common law was recognized by the United States Supreme Court, speaking by Mr. Justice Story, in Terrett *v.* Taylor, 9 Cranch 43, 46 (churchwardens), and in Pawlet *v.* Clark, 9 Cranch 292, 328 (same). The validity of a corporation sole at the common law was recognized in the cases just cited (parson), and in Governor *v.* Allen, 8 Humph. (Tenn.) 176 (governor of a state). As to a corporation sole by virtue of a statute, see Weston *v.* Hunt, 2 Mass. 500 (parson); Brunswick *v.* Dunning, 7 Mass. 445 (parson); Jansen v. Ostrander, 1 Cow. (N. Y.) 670, 679 (a town officer was a corporation "by implication from the act creating the office").

as individuals would be to make a new contract for us. A must hold us as a corporation, or not at all.

But, answers A, a man's rights are not necessarily as large as his assertions. Legal incorporation, to be sure, would have shielded the associates from full liability, but they never were legally incorporated. They assumed the corporate shield without authority. What they assumed without authority may be stripped from them.

It is childish for them to argue that their liability is bounded by their own intent. If they assumed to do an act with limited liability, and they had no authority to limit their liability, then their liability for that act is unlimited. They did not have authority to limit their liability for the act, but that did not prevent the act from being theirs. It is not their liability, but their partial exemption from liability, which fails. They stand exposed to the consequences of their own acts.

The contention that out of a consensual transaction no obligations can arise except such as the parties intended to arise is not sound. The law frequently imposes upon the parties to a consensual transaction certain obligations not covered by their actual, or expressed, intent. Thus A, owner of a tract of land, may convey a portion of it to B, and A may find that the law imposes an easement for B over the land retained, although he had no intent that B should have such easement.[1] Thus A may sell goods to B, and find that the law imposes upon him a warranty of their quality, although he had no intent to make such warranty.[2] Thus A may, without authority, assume, as agent of B, to contract with C, and may find that the law imposes upon him personally a liability under the contract.[3]

The agent does not intend to be bound himself at all, but, if he acts without authority, full liability for the act rests upon him. The associates intend to be bound, but with limited liability. If they are without authority to limit their liability, full liability for the act rests upon them.

The associates reply. It is not fair for A to make this argument. He contracted with us as a corporation. He is estopped to show that we did not have authority to limit our liability.

Estoppel is a term used in the law under a variety of circumstances. A makes a representation which is not true. B acts on

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[1] 3 Gray, Cas. on Prop., 2 ed., 345 *et seq.*
[2] Williston, Cas. on Sales, 2 ed., 686 *et seq.*
[3] Wambaugh, Cas. on Agency, 494 *et seq.*

the representation. Thereafter A is estopped to show that the representation was not true. This is the ordinary case of estoppel by conduct. Now, if A had represented to the associates that they had authority to limit their liability, and had thus induced them to contract, as a corporation, with him, the justice of estopping him from showing that they had no such authority would be obvious. But clearly A, in the case under discussion, made no such representation. The associates themselves made the assertion, the representation.

Is there any basis for estopping A? A takes a lease from B. A does not assert that B has title, and nevertheless A is estopped to deny his landlord's title. Having taken one position, he is not allowed thereafter to take another position logically inconsistent. So, it may be urged, when A consents to deal with the associates as a corporation, he should not be allowed thereafter to take another position logically inconsistent.

There is force in the argument. If a court felt justified in taking note of nothing but the considerations of fairness between the parties to this particular suit, the argument might be allowed to prevail. But it is to be recognized that the courts proceed — and should proceed — with hesitation in estopping a person who has made no misrepresentation. Now, where the estoppel could not rest upon a basis of misrepresentation, where the propriety of raising the estoppel may, even as between the parties themselves, be fairly made the subject of argument, then certainly, if to raise the estoppel would be to produce a result opposed by considerations of public policy, the courts should proceed with great caution.

And to allow the associates to shield themselves from full liability is a result opposed by considerations of public policy. At the present time the chief advantage which associates ordinarily seek to obtain by incorporation is partial exemption from liability for their acts. There are reasons why the state should, under proper regulations, permit this partial exemption; but the policy of freely granting the exemption is not without its dangers. It diminishes the tangible responsibility for acts done. If the exemption is to be enjoyed, it should be enjoyed only when, and as, the state permits it. The soundness of this statement, as a general proposition, is beyond question.

May the courts ever allow it to be enjoyed except in accordance with the regulations of the state? Where the conditions stated in

the opening paragraph of this article are satisfied, — where, in other words, the associates have failed to obtain the exemption only because of some informality or irregularity in their organization, then most, but not all, courts have felt justified in estopping the other contracting party from showing the informality or irregularity.

It is submitted that this is as far as the courts may properly go. If legal incorporation fails for some more serious reason, considerations of public policy outweigh any considerations tending to raise an estoppel against the other contracting party.

Thus, (1) where the associates organize under a law which is unconstitutional; (2) where they organize under a law which permits the formation of some corporations, but not such a corporation as the associates assume to form; (3) where their incorporation failed because of their lack of good faith; (4) where the legal incorporation of the associates has ceased, owing to the lapse of time; and (5) where their assumption of the corporate privilege is naked.[1]

It may be urged that where the associates organize under an unconstitutional law, the case is analogous to one where the incorporation has failed because of some irregularity. The difference between the two cases is doubtless one of degree, not of kind. But there is a marked difference in degree between a case where the state has authorized corporate action, on terms, and the associates have failed to avail themselves of this authority only because of some irregularity in their proceedings, and a case where the state has not authorized such corporate action on any terms. The departure from the cardinal principle that the state may control the formation of corporations is much more serious — too serious to be outweighed by any considerations of an estoppel not based on a misrepresentation.

The fact that there was a law on the statute-book which purported to authorize the formation of such a corporation should not be permitted to change the result. The courts cannot, by any proceeding against the legislature, check the enactment of unconstitutional laws. The question of the constitutionality of a law comes before the courts when some person has acted under it, and usually such person has acted in good faith. The courts cannot give effect to any law there may be on the statute-book simply because some person has, in good faith, acted in reliance upon it.

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[1] See note A, p. 320, on Full Liability of Associates.

That the result is a hardship to the associates is a consideration to be addressed, not to the court, but to the legislature as a check upon legislation of doubtful constitutionality. The associates who seek to do business with a limited liability may properly be required, at their peril, to ascertain the law. Any doctrine of *de facto* laws is highly dangerous. It weakens the sense of responsibility which should rest upon the legislature carefully to conform to the constitution. It weakens the sense of responsibility which should rest upon all persons to ascertain the validity of laws under which they are proceeding.

With respect to all five cases, it may be urged that, if the state's control over corporations is being assailed, there is a sufficient check through the power of the state to bring *quo warranto* proceedings. The state, however, should not be driven to numerous proceedings in *quo warranto* to vindicate its control. It is to be recognized that the fear of *quo warranto* proceedings is only a very slight check upon unauthorized corporate action. The probability of any action by the state in a particular case is usually remote; and the consequences of a judgment are usually not very serious, — it is feasible to arrange for the conduct of the enterprise in some new way. The check is, in practice, not sufficient. To a certain extent, at least, the more effective check by collateral attack is needed. It is to be noted that when the question first arose the courts unhesitatingly permitted collateral attack. In England there is not now, and never has been, any well-developed doctrine to the contrary.[1]

So much as to the full liability of the associates. But a question on a contract between the associates and A may arise in another form. A, for example, may have borrowed money from the associates, as a corporation, and when they sue, as a corporation, for repayment, he may seek to defend on the ground that they were not authorized to act as a corporation. Here A seeks, not to impose, but to avoid, liability; he seeks to repudiate his own obligation; it is not too much to say that his position is repugnant to common honesty. These considerations are of great weight. A very effective check upon unauthorized corporate action has been imposed by exposing the associates to full liability; is there now need of this further check?

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[1] See note B, p. 326, on English Authorities.

If A promises B to pay him one thousand dollars if he will murder C, and B murders C, it is fair, as between A and B, that A should pay the agreed sum. But of course the courts would give no relief to B. It is proper to attach greater weight to the illegality of such a contract than to the considerations of fairness between the parties. Now the contract between the associates and A may be such that it would not be enforced even if made by the associates as partners. Then, *a fortiori*, it will not be enforced when they make it as a corporation.[1]

The state, by its constitution or laws, may have taken affirmative action, indicating an intensified intent to prevent corporate action, for some or any purpose, except on compliance with specified requirements. For example, it may have forbidden any corporation, not organized in a specified manner, to engage in the business of banking. This affirmative action may, in the judgment of the courts, prevent them from giving legal validity to contracts which are prohibited by it.[2]

Assume that the considerations stated in the preceding two paragraphs are not present. Is all unauthorized corporate action illegal? That depends on how the term "illegal" is defined. Any action not legally authorized may be said to be "illegal." But this takes much of the sting out of the term. We do not advance, — it only amounts to saying that unauthorized corporate action is unauthorized.

Unauthorized corporate action is not so strongly to be condemned that legal validity is never to be given to it. If the conditions stated in the opening paragraph of this article are satisfied, the American courts are unanimous in not allowing A to avoid liability on the ground that the associates had no authority to act as a corporation.[3]

Where these conditions are not satisfied, the courts have not been unanimous. Suppose that there is no law authorizing such a corporation as the associates attempted to form. Some courts have then felt themselves obliged to allow A to defend. Their reasoning has taken two forms: (1) A cannot be prevented from raising the question of authority unless he is estopped, and there can be no estoppel on a question of law; (2) there can be no corporation *de facto* unless there can be a corporation *de jure*.

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[1] See Schuetzen Bund *v.* Agitations Verein, 44 Mich. 313.

[2] See Medill *v.* Collier, 16 Oh. St. 599.

[3] 20 HARV. L. REV. 476, n. 33, third division.

(1) The contention that there may not be estoppel on a question of law falls flat. There may be estoppel by record on a question of law.[1] There may be estoppel by deed on a question of law.[2] There may be estoppel by simple contract on a question of law, — the tenant is estopped, though the lease was not under seal, and whether the landlord has title is a question of law.[3] A, wishing to buy a note from B, inquires of C, the maker, if he has any defense. C replies that he has not, and is estopped thereafter to assert a defense.[4] There is nothing in the general principles of the law of estoppel which makes it improper to estop A to show that there was no law under which the associates could have obtained authority for such corporate action.[5]

(2) It is said that there can be no corporation *de facto* unless there can be a corporation *de jure.*[6]

In United States Bank *v.* Stearns[7] the defendant pleaded the general issue. As the law in New York then stood, this put the plaintiff to proof of its corporate existence. The trial judge decided that the charter need not be produced, because the act of incorporation of the Bank of the United States was a public act. The Supreme Court held this to be error. "The least proof which has been held sufficient is the production of an exemplification of the act incorporating the plaintiffs, and evidence of user, under their charter." The case is pertinent, therefore, to show what proof is necessary to establish that a body is a corporation *de jure.*

In Methodist Church *v.* Pickett[8] the defendant, sued on a promise to pay money to the plaintiff, was not allowed to defend on the ground that there were irregularities in its organization. Selden, J., said: "It has been repeatedly held that as against all persons who have entered into contracts with bodies assuming to act in a corporate capacity, it is sufficient for such bodies to show themselves to be corporations *de facto.* This cannot be done by simply show-

1 The doctrine of *res judicata* is not confined to questions of fact.

2 Blackburn *v.* Bell, 91 Ill. 434, 444; Hills *v.* Laming, 9 Exch. 256.

3 Taylor, Landl. & Ten., 9 ed., § 629.

4 The authorities are collected in 16 Cyc. 753, n. 50.

5 For further instances in which the courts have raised an estoppel on a question of law, see Perryman *v.* Greenville, 51 Ala. 507; Strosser *v.* Fort Wayne, 100 Ind. 443; Burlington *v.* Gilbert, 31 Ia. 356; R. R. Co. *v.* Stewart, 39 Ia. 267; Ferguson *v.* Landram, 5 Bush. (Ky.) 230; Motz *v.* Detroit, 18 Mich. 495; People *v.* Murray, 5 Hill (N. Y.) 468; State *v.* Mitchell, 31 Oh. St. 592; Tone *v.* Columbus, 39 Oh. St. 281.

6 See Clark *v.* American Co., 165 Ind. 213, 216, and cases cited.

7 15 Wend. (N. Y.) 314.

8 19 N. Y. 482 (1859).

ing that they have acted as corporations for any period of time, however long. Two things are necessary to be shown in order to establish the existence of a corporation *de facto, viz.*: (1) the existence of a charter, or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user by the party to the suit, of the rights claimed to be conferred by such charter or law." The only authority cited for this proposition was United States Bank *v.* Stearns. The remark that a corporation *de facto* cannot exist unless there is a law under which such a corporation might lawfully be created was in no wise necessary to the decision of the case at bar.

If there is a law authorizing associates, upon the performance of certain conditions, to act as a unit, associates who have not performed the conditions and have not therefore availed themselves of the law, can in fact act as a unit. So much may, on the authorities, be taken as established. But it is difficult to see how the mere existence of such a law was necessary in order that such action could in fact be taken, or how the absence of such a law can prevent the associates from in fact taking such action. The matters required to be shown in order to prove that corporate action is authorized have no bearing whatever on the possibility of unauthorized corporate action. There must be a law in order that corporate action should be authorized. It does not follow that there must be a law in order that there should in fact be unauthorized corporate action.

Following in the wake of Methodist Church *v.* Pickett, many courts have given a restricted, technical meaning to the phrase "corporation *de facto*." But any body of men which in fact assumes to act as a corporation may, and should, be termed a corporation *de facto*. In Y. B., 49 Edw. III, 3 (1375), apparently the earliest reported case bearing upon our subject, there was no law under which the gild could have been incorporated, but Brooke, C. J., commenting on the case, speaks of the gild as "a corporation made by the citizens."[1] Wherever there is unauthorized corporate action there is a fact to which the courts *can* give legal validity. There is nothing in the nature of things to bar the courts from giving legal validity to all unauthorized corporate action. They may be deterred from so doing by reasons of policy, but it is submitted that, where A seeks to avoid liability on the ground that

[1] Brooke, Abr. Corp., 15.

there was no law under which the associates could have obtained authority for their corporate action, the considerations of fairness between the parties may safely be allowed to outweigh the objections to giving validity to unauthorized action.[1]

So much as to contracts with the associates as a corporation. But the person seeking to make collateral attack may not have so contracted. Then the considerations of fairness between the parties drop. The associates are now seeking affirmatively to assert against a stranger a privilege, or right, which they do not possess. To permit this is repugnant to principles underlying our whole law. The chief object of the preceding article on this subject was to show that, even where the conditions stated in the opening paragraph of the article are satisfied, collateral attack should be allowed if the associates seek to assert the corporate privilege to the prejudice of a stranger. If there are not these requisites, *a fortiori*, collateral attack should be allowed.[2]

Viewing the subject as a whole, it is seen that whether or not collateral attack is to be permitted depends not so much on logical deductions as on the exercise of a sound judgment. Opposing considerations must be weighed. The law, therefore, cannot be pictured in bright lines. Some large features, however, emerge. (1) Collateral attack should be permitted to a stranger to whose prejudice the associates seek to assert a right dependent upon incorporation, — and this whether there are the technical requisites of the *de facto* doctrine, or not. (2) The associates should not be shielded from full liability where their legal incorporation failed for some reason more serious than an informality or irregularity in their organization. (3) These effective checks by collateral attack being established, the courts may, in many other instances, properly deny such attack, — and this whether there are the technical requisites of the *de facto* doctrine, or not. Thus, notably, where A seeks to avoid liability on the ground that there was no law under which the associates could have obtained authority for their corporate action.

In closing, attention is called to the form of the English statute of 1900.[3] The advantage of this form of statute, in preventing liti-

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[1] See note C, page 329.

[2] For further questions as to collateral attack, see note D, page 329.

[3] See the close of note B, p. 329, on English Authorities.

gation, is obvious. But it should be coupled with provisions defining the liability of the associates for false statements.

Edward H. Warren.

Note A.

Full Liability of Associates.

In Fay *v.* Noble, 7 Cush. (Mass.) 188, certain persons had been incorporated by a special act, imposing no conditions precedent to incorporation. The associates acted under the law, but did not, in their organization, conform to certain provisions. The trial court ruled that, in consequence, the associates became partners, and an exception to this ruling was sustained by the full bench. Bigelow, J., said that a corporation or its members cannot be made subject to the liabilities of a copartnership, in the absence of all statutory provisions imposing such liabilities. He found on examining the statute that the officers and members of a corporation were made individually liable for its debts in case of non-compliance with certain requisitions, "but no provision is made by which such individual liability attaches by reason of any omission to organize in the manner prescribed by law. . . . The statute, it is true, prescribes the mode of organization, but it annexes no penalty or liability to the neglect or omission to comply with it."

The learned judge then proceeded to say that if, owing to the failure to organize properly, the proceedings of the corporation were void, "there was no principal to appoint an agent. It is a familiar principle of law, that a person who acts as agent without authority or without a principal, is himself regarded as a principal, and has all the rights and is subject to all the liabilities of a principal. If a person purporting to act as agent of a corporation which had no valid legal existence makes contracts and does other acts as its agent, he becomes the principal, and is personally liable therefor. . . . Fuller [the alleged agent] was not the agent of a copartnership, for none existed; he was not the agent of individuals, as such, because he was not authorized so to act; he was not the agent of the West Boston Iron Company, because if the court were right in deciding that it had never organized, and that its proceedings were void, it never had the power to appoint him agent."

It seems clear that the West Boston Iron Company was a corporation *de jure*, and that the irregular organization was, at most, a cause for forfeiture of incorporation. On the second trial of the cause no question was made but that the company was a corporation *de jure* (12 Cush. 1). Therefore the only question was whether or not, by non-compliance with statutory provisions, the members of a corporation *de jure* incurred individual liability. This is the question primarily discussed by the court. It has, obviously, nothing to do with collateral attack upon incorporation.

The court, however, apparently was of opinion that if certain persons assumed without legal authority to act as a corporation, and appointed A an agent to the corporation, and A contracted as agent for the corporation, full liability under the contract fell upon A and no liability fell upon the associates. "There was no principal." But if a body of men — though not legally authorized to act as a unit — direct A to act for them as a body, and A does so act, then this body, this corporation *de facto* is the principal. It is flying in the face of the facts to say that A is acting without a principal. Such a conclusion can be reached only by reverting to the conception of a corporation as a being called forth by the magic of a charter.

And even if we concede that there was no principal, the associates should be held on another ground. For A to contract as agent, when he had no principal, was a wrong. The associates, by representing to him that there was a corporation, and

instructing him to contract for that corporation, induced the wrong. They would therefore be liable for the wrong, just as a person who procures the commission of a trespass is liable for the trespass. See Pollock, Torts, 7 ed., 74; Trowbridge *v.* Scudder, 11 Cush. (Mass.) 83, 86; Medill *v.* Collier, 16 Oh. St. 599, 611.

In Utley *v.* Tool Co., 11 Gray (Mass.) 139, Bigelow, J., said: "We are not called on now to say whether the plaintiffs have any remedy for the collection of their debt against those who participated in the transactions connected with the attempted organization of the supposed corporation."

In First Bank *v.* Almy, 117 Mass. 476, there is a dictum by Gray, C. J.: "Even if the organization of the corporation had been defective, there would have been great difficulty in holding the associates to be subject to the liability of co-partners which they never intended to assume."

Morawetz says (Priv. Corp., 2 ed., § 748): "If an association assumes to enter into a contract in a corporate capacity, and the party dealing with the association contracts with it as if it were a corporation, the individual members of such association cannot be charged as parties to the contract, either severally or jointly, or as partners. . . . It is clear that the members of the association do not agree to be parties to the contract severally or jointly. They do not agree to be bound as partners." This reasoning was applied in Planters Bank *v.* Padgett, 69 Ga. 159, and was approved by dicta in Canfield *v.* Gregory, 66 Conn. 9, 17, and in Miller *v.* Coal Co., 31 W. Va. 836, 840.

Viewing the authorities as a whole, however, they establish the proposition that the associates may be held to full liability on a contract, notwithstanding that they intended to contract only as a corporation and therefore to subject themselves only to limited liability. There are decisions to that effect in Christian Co. *v.* Fruitdale Co., 121 Ala. 340; Garnett *v.* Richardson, 35 Ark. 144, 146; Forbes *v.* Whittemore, 62 Ark. 229, 234; Taylor *v.* Branham, 35 Fla. 297, 302; Duke *v.* Taylor, 37 Fla. 64, 75; Pettis *v.* Atkins, 60 Ill. 454; Bigelow *v.* Gregory, 73 Ill. 197; Kaiser *v.* Lawrence Bank, 56 Ia. 104; McLennan *v.* Hopkins, 2 Kan. App. 260; Cincinnati Co. *v.* Bate, 96 Ky. 356; Field *v.* Cooks, 16 La. Ann. 153; Chaffe *v.* Ludeling, 27 La. Ann. 607; Williams *v.* Hewitt, 47 La. Ann. 1076; Eaton *v.* Walker, 76 Mich. 579, 590; Johnson *v.* Corser, 34 Minn. 355, 357; Martin *v.* Fewell, 79 Mo. 401; Furniture Co. *v.* Crawford, 127 Mo. 356, 364; Cleaton *v.* Emery, 49 Mo. App. 345; Davidson *v.* Hobson, 59 Mo. App. 130; Abbott *v.* Omaha Co., 4 Neb. 416; Bank of Watertown *v.* Landon, 45 N. Y. 410; Medill *v.* Collier, 16 Oh. St. 599, 612; Guckert *v.* Hacke, 159 Pa. St. 303; N. Y. Bank *v.* Crowell, 177 Pa. St. 313; Haslett *v.* Wotherspoon, 2 Rich. Eq. (S. C.) 395; Empire Mills *v.* Alston Co., 15 S. W. 505 (Tex.); Mitchell *v.* Jensen, 29 Utah 346; Bergeron *v.* Hobbs, 96 Wis. 641; Slocum *v.* Head, 105 Wis. 431; Owen *v.* Shepard, 59 Fed. 746; Wechselberg *v.* Flour City Bank, 64 Fed. 90; Davis *v.* Stevens, 104 Fed. 235. There are clear dicta to the same effect in Stafford Bank *v.* Palmer, 47 Conn. 443; Lawler *v.* Murphy, 58 Conn. 294, 313; Loverin *v.* McLaughlin, 161 Ill. 417, 435; Sentell *v.* Rives, 48 La. Ann. 1214; State *v.* Debenture Co., 107 La. 562, 570; Michigan *v.* How, 1 Mich. 512; Hill *v.* Beach, 1 Beasl. (N. J) 31, 36; Fuller *v.* Rowe, 57 N. Y. 23, 26. See also Coleman *v.* Coleman, 78 Ind. 344; Flagg *v.* Stowe, 85 Ill. 164; Matter of Browne Co., Ltd., 106 La. 486; Montgomery *v.* Forbes, 148 Mass. 249; Booth *v.* Wonderly, 36 N. J. L. 250; Worthington *v.* Griesser, 77 N. Y. App. Div. 203; Bank *v.* Hall, 35 Oh. St. 158; Ridenour *v.* Mayo, 40 Oh. St. 9; Brundred *v.* Rice, 49 Oh. St. 640; Vanhorn *v.* Corcoran, 127 Pa. St. 255; McGrew *v.* City Produce Exchange, 85 Tenn. 572; Smith *v.* Ins. Co., 14 Fed. 399.

If the conditions stated in the opening paragraph of the article are satisfied, the associates have usually been shielded from full liability to the other contracting party, but not on the reasoning that no liability might be imposed upon them except such as they had intended to assume. Snider's Co. *v.* Troy, 91 Ala. 224; Cory *v.* Lee, 93 Ala. 468; Owensboro Co. *v.* Bliss, 132 Ala. 253; Humphreys *v.* Mooney, 5 Colo. 282; Doty

v. Patterson, 155 Ind. 60; Finnegan *v.* Noerenberg, 52 Minn. 239; Johnson *v.* Okerstrom, 70 Minn. 303; Kleckner *v.* Turk, 45 Neb. 176; Hogue *v.* Capital Bank, 47 Neb. 929; Larned *v.* Beal, 65 N. H. 184; Stout *v.* Zulick, 48 N. J. L. 599; Vanneman *v.* Young, 52 N. J. L. 403; Rowland *v.* Meader Co., 38 Oh. St. 269; Mason *v.* Stevens, 16 S. D. 320; Shields *v.* Clifton Co., 94 Tenn. 123; Tennessee Co. *v.* Massey, 56 S. W. 35 (Tenn.); American Co. *v.* Heidenheimer, 80 Tex. 344; Clausen *v.* Head, 110 Wis. 405; Gartside Co. *v.* Maxwell, 22 Fed. 197. See also Canfield *v.* Gregory, 66 Conn. 9, 17; Clark *v.* Richardson, 31 S. W. 878 (Ky.); Sentell *v.* Hewitt, 50 La. Ann. 3; Merchants' Bank *v.* Stone, 38 Mich. 779; American Co. *v.* Bulkley, 107 Mich. 447; Love *v.* Ramsey, 139 Mich. 47; Richards *v.* Minnesota Bank, 75 Minn. 196; Whitford *v.* Laidler, 94 N. Y. 145, 151; Wentz *v.* Lowe, 3 Atl. 878 (Pa.).

For the effect of special statutory provisions, see Loverin *v.* McLaughlin, 161 Ill. 417, 434 (*cf.* 83 Ill. App. 643); Eisfeld *v.* Kenworth, 50 Ia. 389; Marshall *v.* Harris, 55 Ia. 182; Clegg *v.* Hamilton Co., 61 Ia. 121; Heuer *v.* Carmichael, 82 Ia. 288 (*cf.* Bank of Davenport *v.* Davies, 43 Ia. 424, followed in Jessup *v.* Carnegie, 80 N. Y. 441); Sweney *v.* Talcott, 85 Ia. 103; Thornton *v.* Balcom, 85 Ia. 198; Stokes *v.* Findlay, 4 McCrary (U. S. C. C.) 205.

If the state has taken affirmative action and by its constitution or laws has indicated an intensified intent not to permit corporate action, except on compliance with stated requirements, then, although the conditions stated in the opening paragraph of the article are satisfied, the courts may hold the associates to full liability. Medill *v.* Collier, 16 Oh. St. 599, 612 (associates engaged in the banking business without making a required deposit of securities; it is not entirely clear whether the court considered that the associates had not been incorporated, or that they were engaged in an *ultra vires* transaction; apparently the court would have reached the same result on either supposition).

There are some decisions holding the associates to full liability to the other contracting party, although the conditions stated in the opening paragraph of the article are satisfied and there has been no such affirmative action by the state. Garnett *v.* Richardson, 35 Ark. 144; Bigelow *v.* Gregory, 73 Ill. 197; Kaiser *v.* Lawrence Bank, 56 Ia. 104; Williams *v.* Hewitt, 47 La. Ann. 1076 (full consideration of the question of estoppel); Bergeron *v.* Hobbs, 96 Wis. 641; Wechselburg *v.* Flour City Bank, 64 Fed. 90. See also Johnson *v.* Corser, 34 Minn. 355, 357; Abbott *v.* Omaha Co., 4 Neb. 416. *Cf.* Granby Co. *v.* Richards, 95 Mo. 106, with the reasoning of the court in Hurt *v.* Salisbury, 55 Mo. 310.

If the law under which the associates organized is unconstitutional, the court, in Michigan *v.* How, 1 Mich. 512, said that the associates would be exposed to full liability. "When the law under which such exemption is claimed is unconstitutional, the exemption itself ceases to exist." There is a dictum to the same effect in Burton *v.* Schildbach, 45 Mich. 504, 511, and a decision in Eaton *v.* Walker, 76 Mich. 579, 590. "Obligors are bound, not by the style which they give to themselves, but by the consequences which they incur by reason of their acts." The court would apparently have held the associates even if the plaintiff had admitted that he dealt with them as a corporation. See also Clark *v.* American Co., 165 Ind. 213, 216.

In Planters Bank *v.* Padgett, 69 Ga. 159, a court assumed, by a judgment, to incorporate associates. The judgment was held to be void, but the associates were shielded from full liability on the authority of Morawetz (§ 748, *supra*).

In Richards *v.* Minnesota Bank, 75 Minn. 196, the name of a corporation *de jure* was changed. *Held*, that, even if the act making the change was unconstitutional, persons contracting with the corporation in such new name could not hold the stockholders to full liability.

Where the law under which the associates organized did not authorize such a corporation as they attempted, they were held to full liability in Davis *v.* Stevens, 104 Fed. 235 (Mason *v.* Stevens, 16 S. D. 320, is not inconsistent with this principle). To the same effect are Booth *v.* Wonderly, 36 N. J. L. 250 (a charter authorizing a business to be carried on in Trenton was used in conducting a business at Jersey City; apparently no stock was subscribed; the persons who assumed to act as directors were held to full liability); Ridenour *v.* Mayo, 40 Oh. St. 9 (trustees of a savings bank used name of bank in carrying on a general banking business). See also Vredenburg *v.* Behan, 33 La. Ann. 627; Hill *v.* Beach, 1 Beasl. (N. J.) 31, 36 (one ground of the decision was that the laws of New York did not authorize a corporation to be formed by the residents of another state to do business only in that other state).

In Merchants' Bank *v.* Stone, 38 Mich. 779, Marston, J., dissenting, *held,* that a statute authorizing manufacturing corporations did not authorize lumbering companies, and that the associates were exposed to full liability. The grounds on which the majority proceeded, in protecting the associates, are not clear.

Where associates are incorporated by State M, they cannot act as a corporation in State N, unless the courts of State N see fit to give validity to the incorporation. Where the courts of State N have refused to give validity to a foreign incorporation, they have held the associates to full liability on their contracts. Taylor *v.* Branham, 35 Fla. 297; Cleaton *v.* Emery, 49 Mo. App. 345; Davidson *v.* Hobson, 59 Mo. App. 130; Empire Mills *v.* Alston Co., 15 S. W. 505 (Tex.). See also Duke *v.* Taylor, 37 Fla. 64; Montgomery *v.* Forbes, 148 Mass. 249; Hill *v.* Beach, 1 Beasl. (N. J.) 31, 36; Owen *v.* Shepard, 59 Fed. 746, 749. It may be noted in passing that the present tendency of the courts is to go far in giving validity to a foreign incorporation. See Demarest *v.* Flack, 128 N. Y. 205; Second Bank *v.* Hall, 35 Oh. St. 158.

Where the associates have not acted in good faith, a preliminary question arises. It seems always to have been the law in this country that a charter obtained by fraud was voidable, and not void (as to the English law, see Morgan *v.* Seaward, 2 M. & W. 544, 561; Macbride *v.* Lindsay, 9 Hare, 574, 583; Robinson *v.* London Hospital, 22 L. J. Ch. 754, 757). Thus, if the legislature is induced by fraud to pass a special act of incorporation, the corporation comes into being, and the fraud is only a cause of forfeiture by the state. Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344, 370. Similarly, if the legislature has by a special or general law authorized a designated official or body to issue a charter or a certificate (which is made conclusive evidence of incorporation) upon the performance of conditions precedent, and the official or body is induced by fraud to issue such charter or certificate. Rice *v.* Bank of Commonwealth, 126 Mass. 300 (Mass. Laws of 1903, c. 437, § 12, provides that the certificate of the Secretary of State "shall have the force and effect of a special charter"); Nat'l Bank *v.* Rockefeller, 195 Mo. 15, 42 (the statute provides that the certificate of the Secretary of State "shall be taken by all courts of this State as evidence of the corporate existence of such corporation"; the court held that the certificate was equivalent to a special act of the legislature; whether this was a sound construction of the statute, *quaere*); Centre Co. *v.* M'Conaby, 16 Serg. & R. (Pa.) 140, 1 Pen. & W. (Pa.) 426, 431; Travaglini *v.* Societa Italiane, 5 Pa. Dist. 441; German Ins. Co. *v.* Strahl, 13 Phila. (Pa.) 512. See also Pattison *v.* Albany Ass'n, 63 Ga. 373; Laflin Co. *v.* Sinsheimer, 46 Md. 315; U. S. Vinegar Co. *v.* Schlegel, 143 N. Y. 537; Cochran *v.* Arnold, 58 Pa. St. 399; Wells Co. *v.* Gastonia Co., 198 U. S. 177, 185. Similarly, if the designated official or body is induced by fraud to do an act the performance of which is one of the conditions precedent to incorporation. Duke *v.* Cahawba Co., 16 Ala. 372; Litchfield Bank *v.* Church, 29 Conn. 137, 148; Jones *v.* Dana, 24 Barb. (N. Y.) 395; Tar River Co. *v.* Neal, 3 Hawks (N. C.) 520.

Wherever the legislature has authorized the formation of a corporation upon the performance of certain conditions precedent, the courts must necessarily determine

whether the legislature intended to require a certain mental state in the corporators as one of these conditions. Considering the difficulty of proof on such a point, the courts may incline against such a construction of the law. See Importing Co. *v.* Locke, 50 Ala. 332, 334; Niemeyer *v.* Little Rock Ry., 43 Ark. 111, 120; Aurora Co. *v.* Lawrenceburgh, 56 Ind. 80, 87; Lincoln Ass'n *v.* Graham, 7 Neb. 173; Atty.-Gen. *v.* Stevens, Saxt. Ch. (N. J.) 369, 378; Nat'l Docks Co. *v.* Central R. R., 32 N. J. Eq. 755; Terhune *v.* Midland Co., 38 N. J. Eq. 423; Atty.-Gen. *v.* Am. Tobacco Co., 55 N. J. Eq. 352, 369, aff'd 56 N. J. Eq. 847; Buffalo Co. *v.* Hatch, 20 N. Y. 157, 159; Wellington Co. *v.* Cashie Co., 114 N. C. 690; Cochran *v.* Arnold, 58 Pa. St. 399, 405; Windsor Co. *v.* Carnegie Co., 204 Pa. St. 459, and cases cited. *Cf.* Christian Co. *v.* Fruitdale Co., 121 Ala. 340, 345; Montgomery *v.* Forbes, 148 Mass. 249; Augir *v.* Ryan, 63 Minn. 373; Hill *v.* Beach, 1 Beasl. (N. J.) 31, 36; Jersey City Co. *v.* Dwight, 29 N. J. Eq. 242 (the learned vice-chancellor who decided this case assumed, 46 N. J. Eq. 116, that it could not stand with 32 N. J. Eq. 755. But see 49 N. J. Eq. 329, 335); Elizabeth Co. *v.* Green, 49 N. J. Eq. 329 (by five dissenting judges. Whether the majority was opposed on this point does not appear. The decision is explained in 52 N. J. Eq. 111, 144, on a ground consistent with this opinion by the dissenting judges); Farnham *v.* Benedict, 107 N. Y. 159, 169; Brundred *v.* Rice, 49 Oh. St. 640; McGrew *v.* City Produce Exchange, 85 Tenn. 572; Le Warne *v.* Meyer, 38 Fed. 191. See also Carey *v.* Cincinnati Co., 5 Ia. 357; Chicora Co. *v.* Crews, 6 S. C. 243, 275. In New Orleans Co. *v.* Louisiana, 180 U. S. 320, 330, Peckham, J., said: "If not created for a lawful purpose, the company was not created at all." There is a dictum to the same effect by Lord Herschell in Salomon *v.* Broderip, [1897] A. C. 22, 43.

The legislature may, however, require a certain mental state as a condition precedent to incorporation. Thus it may require that certain subscriptions or payments be made in good faith. And, it is submitted, where the legislature requires that certain statements be made and filed or recorded in a public office, the courts should hold that the legislature intended to require that such statements be made in good faith.

Assume that such requirement is made. For example, the legislature requires the associates to state the amount of capital stock subscribed and paid in. The associates make statements which are false, and which are known to be false. If incorporation fails because such statements are not made in good faith, it would seem to be clear that the associates should be held to full liability on their contracts. To say that A, the other contracting party, is estopped to show that the associates are not incorporated when the incorporation has failed because the associates made a representation which they knew was not true, and A has acted on it to his hurt, would be contrary to the principles underlying the law of estoppel. There is no equity in estopping A under these circumstances; the equity is all the other way. Here then is a case where justice between the parties and public policy both require that the associates be held to full liability. One may be permitted to be astonished at a doctrine which protects the associates, — it is contrary to the manner in which the courts deal with fraud in every other branch of the law.

In Gow *v.* Collin, 109 Mich. 45, the plaintiff alleged that the statements of the associates in their certificate of incorporation respecting their capital were false, and that he contracted with them relying on these statements; he sought to hold them to full liability. A demurrer to the bill was sustained. "The company, in form, was duly incorporated, was recognized by the public authorities, and filed its annual reports, and did business as a corporation. The complainants dealt with it as a corporation." In substance, this was all the consideration which the court gave to the point. The decision is the more remarkable when compared with Doyle *v.* Mizner, 42 Mich. 332.

In Cochran *v.* Arnold, 58 Pa. St. 399, the reasoning of the court goes as far as the decision in Gow *v.* Collin. But the statements, although technically untrue, do not seem

to have been made in bad faith, and, in any event, the other contracting party knew all the facts.

Laflin Co. *v.* Sinsheimer, 46 Md. 315. From portions of the opinion it would appear that the court dealt with the case as one of incorporation secured by fraud. But elsewhere (p. 320) it says that the validity of the incorporation cannot be collaterally attacked "by proving *aliunde* the certificate of its incorporation that certain prerequisites of the law had not been in good faith complied with."

In Webb *v.* Rockefeller, 195 Mo. 57, the court held that A, who had contracted with the associates, could not recover in tort because he was not of the class intended to be influenced by the representations as to their capital.

On the other hand, in Montgomery *v.* Forbes, 148 Mass. 249, the defendant falsely stated that the business of the corporation was to be carried on in a certain state; he thereafter purchased goods in the name of the corporation, and was held to full liability. There is a dictum to the same effect in Gartside Co. *v.* Maxwell, 22 Fed. 197. See also Cleaton *v.* Emery, 49 Mo. App. 345; Davidson *v.* Hobson, 59 Mo. App. 130; Hill *v.* Beach, 1 Beasl. (N. J.) 31, 36; Booth *v.* Wonderly, 36 N. J. L. 250. In Christian Co. *v.* Fruitdale Co., 121 Ala. 340, 345, the question was whether or not the associates were to be held to full liability to one who had contracted with them not knowing that they assumed to act as a corporation. The evidence went to show that affidavits as to the capital were false. "We are, therefore, clear to the conclusion . . . that all the evidence . . . tending to show that the incorporation . . . was a fraud and a pretense intended to cover a partnership business, to shield the partners from individual liability and to set up a straw corporation without capital and without assets should have been allowed to go to the jury."

In Brundred *v.* Rice, 49 Oh. St. 640, 650, where a corporation was not organized in good faith, but for the purpose of consummating an illegal agreement, the associates were held accountable for moneys nominally paid to the corporation. "The act of incorporating can be of no avail to them as a defense." To the same effect is McGrew *v.* City Produce Exchange, 85 Tenn. 572.

If the attempt at incorporation is not made in good faith, but persons purchase the stock in good faith, they should not be exposed to full liability to those who have contracted with the corporation. American Co. *v.* Heidenheimer, 80 Tex. 344. See also Minor *v.* Mechanics Bank, 1 Pet. (U. S.) 46, 66.

In Bank of Watertown *v.* Landon, 45 N. Y. 410, the associates, after the expiration of their charter, agreed to continue the business, and the business was continued ostensibly by a corporation. The plaintiff became the owner of a note signed in the name of the corporation, and which he believed was made by a corporation *de jure*. The associates were held to full liability. *Cf.* the dictum in Miller *v.* Coal Co., 31 W. Va. 836, 840.

Where the assumption of the corporate privilege was naked, the associates have uniformly been held to full liability to the other contracting party. Forbes *v.* Whittemore, 62 Ark. 229; Pettis *v.* Atkins, 60 Ill. 454; McLennan *v.* Hopkins, 2 Kan. App. 260; Chaffe *v.* Ludeling, 27 La. Ann. 607, 611; Johnson *v.* Corser, 34 Minn. 355 (see the explanation of this case in 52 Minn. 239, 244); Furniture Co. *v.* Crawford, 127 Mo. 356, 364; Haslett *v.* Wotherspoon, 2 Rich. Eq. (S. C.) 395; Owen *v.* Shepard, 59 Fed. 746. See also Johnson *v.* Okerstrom, 70 Minn. 303, 311; Martin *v.* Fewell, 79 Mo. 401; Bergeron *v.* Hobbs, 96 Wis. 641. The assumption of the corporate privilege may be called naked wherever the associates have not filed or recorded their certificate of incorporation (or similar paper) in any public office designated by law for the filing of such papers.

Even when the conditions stated in the opening paragraph of the article are satisfied, if the other contracting party did not have knowledge, and cannot reasonably be charged with knowledge, that the associates intended to contract as a corporation, — in other words, where there is no basis for any estoppel against him, the associates are held to full liability. Christian Co. *v.* Fruitdale Co., 121 Ala. 340; Duke *v.* Taylor, 37 Fla. 64; Field *v.* Cooks, 16 La. Ann. 153; Martin *v.* Fewell, 79 Mo. 401; Guckert *v.* Hacke, 159 Pa. St. 303; N. Y. Bank *v.* Crowell, 177 Pa. St. 313; Slocum *v.* Head, 105 Wis. 431. See also Lawler *v.* Murphy, 58 Conn. 294, 313; Eaton *v.* Walker, 76 Mich. 579, 587; Mitchell *v.* Jensen, 29 Utah 346, 360; Clausen *v.* Head, 110 Wis. 405.

As to the liability of the associates in tort, see the article in 20 HARV. L. REV. 456, and the authorities collected in note 30 to that article.

No associate can be held unless he has participated in, authorized, or ratified the act because of which the plaintiff asks relief. But no rules to determine what is authorization or ratification should be evolved which are contrary to the general principles of agency. The same rules should be applied as in the case of joint-stock companies whose members do not assume to be incorporated. If a body of men unite to engage in a business, and appoint a few of their number to manage it, and these few, or their sub-agents, make contracts within the scope of the business, the contracts so made are authorized by the associates, — it should not be necessary to show that the associates authorized the particular transaction. See Pettis *v.* Atkins, 60 Ill. 454; Frost *v.* Walker, 60 Me. 468; Tappan *v.* Bailey, 4 Met. (Mass.) 529; Ferris *v.* Thaw, 72 Mo. 446; Booth *v.* Wonderly, 36 N. J. L. 250; Medill *v.* Collier, 16 Oh. St. 599, 613; Ash *v.* Guie, 97 Pa. St. 493. *Cf.* Stafford Bank *v.* Palmer, 47 Conn. 443; Central Bank *v.* Walker, 66 N. Y. 424; Seacord *v.* Pendleton, 55 Hun (N. Y.) 579.

NOTE B.

English Authorities.

It was recognized from a very early date that certain bodies of men were authorized of common right to act as a unit for some purposes. Such bodies were called corporations at the common law. Y. B., 11 Hen. IV, 12; Y. B., 37 Hen. VI, 30; Y. B., 8 Edw. IV, 6; Y. B., 20 Edw. IV, 2; Y. B., 14 Hen. VIII, 2; Co. Lit. 3*a;* Finch's Law, c. XVII; Keilw, 32*a;* 2 P. Wms. 125; 4 Vin. Abr. 525. See also Madox, Firma Burgi, 85, 91. *Cf.* Y. B., 19 Hen. VI, 80.

The general rule, however, was that a body of persons were not authorized of common right to act as a unit. Madox, Firma Burgi, 26; Bracton, lib. I, c. 24, fol. 56; Y. B., 49 Edw. III, 3; Y. B., 10 Hen. IV, 3; Y. B., 20 Edw. IV, 2; Y. B., 22 Edw. IV, 34; Y. B., 12 Hen. VII, 27; Brooke, Abr. Corp., 81.

The sovereign could, by charter, authorize a body of men to act as a unit. The courts refused to give effect to such authorization when made by any person or body other than the sovereign. Madox, *supra;* Bracton, *supra;* Y. B., 49 Edw. III, 3; Dyer 81, fl. 64; Brooke, Abr. Corp. 33. *Cf.* Y. B., 14 Hen. VIII, 2.

Collateral attack upon legal incorporation was unhesitatingly permitted. Y. B., 49 Edw. III, 3; Y. B., 20 Edw. IV, 2; Y. B., 22 Edw. IV, 34; Y. B., 12 Hen. VII, 27.

For the remarks of Coke as to the nature of a corporation, see *supra*, p. 306.

Adams & Lamberts Case, 4 Coke 104*b*, 107*b*. By statute 1 Edw. VI, c. 14, "all manner of colleges" were given to the king. The court might well have construed this to include all colleges, incorporated or unincorporated, but "a difference was agreed: that where the college, chauntry, &c had such beginnings which might have made a lawful foundation, but for error or imperfection in the penning or proceeding of it, was not in judgment of law lawfully founded. Such college or chauntry is given

to the King by the said act; but when there is a college or chauntry only in vulgar reputation, without any commencement or countenance of a lawful foundation, there such college or chauntry is not given to the King by this act."

With the economic development of England, there came to be need of some device by which the capital of many persons could be united. Charters of incorporation were difficult to obtain; large partnerships, therefore, were formed, the articles of partnership being moulded so as to give, as far as possible, the same results as though the members were incorporated. Such a large partnership was usually called a joint-stock company. These companies were not infrequently promoted in a manner calculated to mislead and injure the public. The public might be led to believe that they could free themselves of all liability at any time by transferring their shares, and that their liability, while they continued members of the company, would be limited to the par value of their share. Moreover, many companies were formed to carry out projects not economically justifiable.

These companies aroused such hostility that Parliament passed a statute, commonly known as the Bubble Act, to repress them. Geo. I, c. 18 (1719). This provided, among other things, that "the acting or presuming to act as a corporate body or bodies . . . without legal authority . . . shall . . . forever be deemed to be illegal and void"; and that violations of the act should be deemed to be public nuisances and punishable in the criminal courts as such (§§ 18, 19).

This statute was in force for over a century. The objection that a company was illegal under this statute could, without doubt, be raised collaterally. See Buck *v.* Buck, 1 Campb. 547; Rex *v.* Stratton, 1 Campb. 549, n.; Pratt *v.* Hutchinson, 15 East 510; Josephs *v.* Pebrer, 3 B. & C. 639; Kinder *v.* Taylor (per Eldon, C.), 3 L. J. Rep. (o. s.) 68.

When these provisions were repealed (6 Geo. IV, c. 91, 1825), Lord Eldon secured the introduction of a recital that it was expedient that such matters "should be adjudged and dealt with in like manner as the same might have been adjudged and dealt with according to the Common Law."

In Duvergier *v.* Fellows, 5 Bing. 248, 266 (1828), Best, C. J., said: "Persons who, without the sanction of the legislature, presume to act as a corporation are guilty of a contempt of the King, by usurping on his prerogative." A defendant convicted in a *quo warranto* proceeding may be fined, and "this shows that the usurpation is considered as a criminal act . . . The acting as such a corporation, without charter from the Crown, is contrary to law, and no man can maintain an action on a bond given to secure payment of a compensation to the obligee for the formation of any such pretended corporations." This reasoning necessarily leads to the conclusion that there may always be collateral attack on unauthorized corporate action. See also Blundell *v.* Winsor, 8 Sim. 601.

On the other hand, Tindal, C. J., said: "I am not aware that presuming to act as a corporate body was an offense at common law." Harrison *v.* Heathorn, 6 M. & G. 81, 107 (1843). See also Queen *v.* Tankard, [1894] 1 Q. B. 548, 551.

As to what action is an assumption of the corporate privilege, see Duvergier *v.* Fellows, 5 Bing. 248; Walburn *v.* Ingilby, 1 M. & K. 61, 76; Garrard *v.* Hardey, 5 M. & G. 471; Harrison *v.* Heathorn, 6 M. & G. 81, 137; Sheppard *v.* Oxenford, 1 K. & J. 491, 495.

The Companies Act of 1862 (25 & 26 Vict., c. 89, § 4) provided that "no company, association, or partnership consisting of more than twenty persons shall be formed . . . unless it is registered as a company under this Act." This provision is still in force. The courts have uniformly refused to enforce any contract made with a body which should have been registered under this provision. The authorities are collected in Lindley, Companies, 6 ed., 185, note c.

This review of the authorities establishes that there is no authority in England from

the earliest times to the present day denying collateral attack upon incorporation where the assumption of the corporate privilege is naked.

Suppose, however, (1) that a charter of the king has been actually, but improvidently, issued; or (2) that Parliament has passed a special act of incorporation to become effective upon the performance of conditions precedent, and that the conditions have not been performed; or (3) that there has been partial, but not complete, compliance with the provisions of a general incorporation law.

(1) Grant was of opinion that if a charter had been issued by the king as an exercise of the royal prerogative and it was in excess of such prerogative, the associates and their successors were, after acceptance, estopped to dispute the validity of the charter. But the authorities which he cites cannot be said clearly to establish his point. Grant, Corp., 20 (note p), 21 (notes q and r), 22 (notes t and x), 23 (note b).

In Queen *v.* Boucher, 2 G. & D. 737 (1842), a statute authorized the crown, on a given state of facts, to grant a charter of incorporation to a municipality. The crown granted a charter. The court refused, where the validity of the incorporation was questioned collaterally, to inquire whether the charter had been properly granted. This is apparently the first case in which the English courts denied collateral attack. The remarks of Denman, C. J. (p. 749), are inconsistent with his own remarks in Rutter *v.* Chapman, 8 M. & W. 1, 110.

In Atty.-Gen. *v.* Avon, 33 Beav. 67, 74 (modified, on appeal, 9 L. T. (N. S.) 187), a court of equity declined to inquire collaterally whether a municipal charter, actually issued by the crown, was, under the terms of the statute, properly issued.

(2) Denton *v.* East Anglian Co., 3 C. & K. 16. Parliament passed an act consolidating three corporations into one, the act to take effect when a certain certificate was given. The plaintiff sued the consolidated company to recover the price of goods sold. Counsel for the defendant objected that the plaintiff had not shown that the certificate had been given. A witness testified that business had been done in the name of the consolidated company. Campbell, C. J., directed a verdict for the plaintiff.

(3) The first general incorporation law in England was passed in 1844 (7 & 8 Vict., c. 110). In Pilbrow *v.* Pilbrow's Co., 5 C. B. 440, 472 (1848), three of the judges apparently were of the opinion that a certificate of registration under the statute was conclusive evidence of the incorporation of the associates. It put the associates "upon the same footing as if they held the patent confirmed by an act of Parliament." In Banwen Iron Co. *v.* Barnett, 8 C. B. 406 (1849), the question was considered with more care. A shareholder resisted a call on the ground that the certificate of registration had been granted upon the production of a deed not containing all the matter required by law. Maule and Williams, JJ., concurred in disallowing this defense. Both judges inclined to hold "that, although the registrar may have erred in granting a certificate of complete incorporation, the company [was] to be considered as an incorporated company, until dissolved by a competent authority." Maule, J., who gave the principal opinion, rested his judgment, however, on a narrower ground. The defendant was to be taken as one of the shareholders who concurred in having the deed registered, and therefore he could not raise any objection to the incorporation. But a stranger's position would differ materially — the certificate might not be conclusive upon everybody.

Williams, J., had remarked that "the Statute appears to be defectively drawn." By 19 & 20 Vict., c. 47, § 13 (1856), it was provided that "the certificate of incorporation given by the registrar shall be conclusive evidence that all the requisitions of this act in respect of registration have been complied with." This provision was repeated in the Companies Act of 1862 (25 & 26 Vict, c. 89).

Nevertheless collateral attack has been allowed where the objection was that the company was not such a company as was authorized to be registered. *In re* Northumberland Dist. Banking Co., 2 De G. & J. 357; *In re* Nat. Debenture Corporation,

[1891] 2 Ch. 505 (Kekewich, J., said that the certificate was conclusive only "as to matter of machinery"). See also Liverpool Bank *v.* Mellor, 3 H. & N. 551; *In re* Bridport Old Brewery Co., L. R. 2 Ch. 191, 195; Wenlock *v.* River Dee Co., 36 Ch. D. 674, 693. *Cf.* Peel's Case, L. R. 2 Ch. 674, 681; Oakes *v.* Turquand, L. R. 2 H. L. 325, 351; Reuss *v.* Bos., L. R. 5 H. L. 176, 200; Nassau Phosphate Co., 2 Ch. D. 610; *In re* Ennis Co., L. R. Ir. 3 Ch. D. 94; Glover *v.* Giles, 18 Ch. D. 173; Hill *v.* Hill, 55 L. T. (N. S.) 769; *In re* Laxon & Co., [1892] 3 Ch. 555; Ladies Dress Ass'n *v.* Pulbrook, [1900] 2 Q. B. 376.

By 63 & 64 Vict., c. 48, § 1 (1900), it is provided that the registrar's certificate "shall be conclusive evidence that all the requisitions of the Companies Acts in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under the Companies Act."

Questions as to collateral attack upon incorporation usually have arisen in the United States where there has been partial, but not complete, compliance with the provisions of a general incorporation law. Owing to the form of their statutes, the English courts have, in the main, not been troubled by these questions.

Apparently no English judge has ever attempted to define the phrase "*de facto* corporation."

Note C.

A subscribes to the stock of a corporation organized under an unconstitutional law. The corporation may maintain an action for payment of the subscription. Evansville Co. *v.* Evansville, 15 Ind. 395, 416; East Pascagoula Co. *v.* West, 13 La. Ann. 545; Weinman *v.* Wilkinsburg Co., 118 Pa. St. 192. See also St. Louis Ass'n *v.* Hennessy, 11 Mo. App. 555.

A takes insurance from such a corporation and gives his note in payment. The corporation may maintain an action for payment of the note. Freeland *v.* Penn. Co., 94 Pa. St. 504. *Contra*, Skinner *v.* Wilhelm, 63 Mich. 568.

A borrows money from such a corporation. It may maintain an action for repayment, and may enforce the securities given. Winget *v.* Quincy Ass'n, 128 Ill. 67; Platte Bank *v.* Harding, 1 Neb. 461; Building Ass'n *v.* Chamberlain, 4 S. D. 271. See also St. Louis *v.* Shields, 62 Mo. 247, 252. *Contra*, Green *v.* Graves, 1 Doug. (Mich.) 351; Owen *v.* Bank of Sandstone, 2 *ibid*, 134. But in Burton *v.* Schildbach, 45 Mich. 504, a receiver of the corporation was allowed to proceed in equity to require A to account, although the receiver was not allowed to enforce the securities given.

Such a corporation carries goods for A. It may recover the toll. Black River Co. *v.* Holway, 85 Wis. 344.

The receiver of such a corporation may maintain an action against the state itself to recover the consideration paid for a grant which had failed. Coxe *v.* State, 144 N. Y. 396.

Where the corporation is organized under a law which permits the formation of some corporations, but not of such a corporation as was organized, it may maintain an action for payment of a subscription to its stock. Per Rapallo, J., in Phœnix Co. *v.* Badger, 67 N. Y. 294. *Contra*, Raccoon River Co. *v.* Eagle, 29 Oh. St. 238.

A borrows money from such a corporation. It may maintain an action for repayment, and may enforce the securities given. Homestead Co. *v.* Linigan, 46 La. Ann. 1118. See also New Orleans Co. *v.* Louisiana, 180 U. S. 320, 328. *Cf.* Workingmen's Bank *v.* Converse, 29 La. Ann. 369.

Note D.

Where legal incorporation failed because of a lack of good faith on the part of the associates, but this lack in no wise injured A, the corporation may maintain an action

for breach of A's contract. See Southern Bank *v.* Williams, 25 Ga. 534; Smith *v.* Mississippi Co., 14 Miss. 179; United States Co. *v.* Schlegel, 143 N. Y. 537; Palmer *v.* Lawrence, 3 Sandf. (N. Y.) 161, 168; Wallace *v.* Loomis, 97 U. S. 146, 154. Note also Pattison *v.* Albany Ass'n, 63 Ga. 373.

Where legal incorporation has ceased because of lapse of time, and A thereafter contracts with the associates as a corporation, the corporation may maintain an action for breach of A's contract. West Missouri Co. *v.* Kansas City Co., 161 Mo. 595; Miller *v.* Coal Co., 31 W. Va. 836, 841; Citizens Bank *v.* Jones, 117 Wis. 446. *Contra*, White *v.* Campbell, 5 Humph. (Tenn.) 38 (1844). But if A dealt with the associates as a corporation while their charter was in force, he may show that, at time of suit brought, the charter had expired through lapse of time. Clark *v.* American Coal Co., 165 Ind. 213.

Where the assumption of the corporate privilege is naked, the propriety of allowing this to be a foundation of rights in the associates may well be doubted. If A contracts with the associates as a corporation, does this without more give them a right to sue A as a corporation? Some courts have been careful not to commit themselves to any larger doctrine than that the contract is sufficient to make a *primâ facie* case of incorporation. See Montgomery R. R. *v.* Hurst, 9 Ala. 513; Gaines *v.* Bank of Mississippi, 12 Ark. 769; Brown *v.* Mortgage Co., 110 Ill. 235, 241; Williams *v.* Cheney, 3 Gray (Mass.) 215, 220; Topping *v.* Bickford, 4 Allen (Mass.) 120, 121; Williamsburg Co. *v.* Frothingham, 122 Mass. 391; French *v.* Donohue, 29 Minn 111, 113; Johnston Co. *v.* Clark, 30 Minn. 308; Den *v.* Van Houten, 5 Halst. (N. J.) 270; Ryan *v.* Martin, 91 N. C. 464. Some courts have gone further, and have said that where the assumption is naked the associates may not sue as a corporation. See Schuetzen Bund *v.* Agitations Verein, 44 Mich. 313; Methodist Church *v.* Pickett, 19 N. Y. 482. On the other hand, there is a cloud of dicta to the effect that if A contracts with the associates as a corporation, he is estopped to show that they were not authorized to act as a corporation. Such a dictum seems first to have been made in Dutchess Manufactory *v.* Davis, 14 Johns. (N. Y.) 239 (1817), in which the court relied on Henriques *v.* Dutch West India Co, 2 Ld. Raym. 1532. See the explanation of this latter case by Nelson, J., in Welland Canal Co. *v.* Hathaway, 8 Wend. (N. Y.) 480, 481. While the language of these dicta is unrestrained, and, taken at its face value, covers the case of naked assumption, it is clear that in nearly all of the cases no question as to naked assumption was present to the minds of the judges. Such dicta will be found in McCullough *v.* Talladega Co., 46 Ala. 376; Lehman *v.* Warner, 61 Ala. 455, 466; Greenville *v.* Greenville Co., 125 Ala. 625, 642; Searcy *v.* Yarnell, 47 Ark. 269, 281; Plummer *v.* Struby-Estabrooke Co., 23 Colo. 190, 193; School District *v.* Alderson, 6 Dak. 145, 149; Booske *v.* Gulf Ice Co., 24 Fla. 550, 559; Petty *v.* Brunswick Ry. Co., 109 Ga. 666, 674; Lombard *v.* Chicago Congregation, 64 Ill. 477, 487; John *v.* Farmers' Bank, 2 Blackf. (Ind.) 367, 369; Ensey *v.* Cleveland Co., 10 Ind. 178; Beaver *v.* Hartsville University, 34 Ind. 245; Jones *v.* Kokomo Ass'n, 77 Ind. 340; Cravens *v.* Eagle Co., 120 Ind. 6; Depew *v.* Bank of Limestone, 1 J. J. Marsh (Ky.) 378, 380; Blanc *v.* Germania Bank, 114 La. 739; Meadow Dam Co. *v.* Gray, 30 Me. 547, 549; Worcester Institution *v.* Harding, 11 Cush. (Mass) 285; Stoutimore *v.* Clark, 70 Mo. 471, 477; Mason *v.* Crowder, 98 Mo. 352; Congregational Soc. *v.* Perry, 6 N. H. 164; Nashua Co. *v.* Moore, 55 N. H. 48, 53; Dutchess Mfy. *v.* Davis, 14 Johns. (N. Y.) 239; Williams *v.* Bank of Michigan, 7 Wend. (N. Y.) 539, 542; Commercial Bank *v.* Pfeiffer, 108 N. Y. 242, 254; All Saints Church *v.* Lovett, 1 Hall (N. Y.) 191, 198; Newburg Co. *v.* Weare, 27 Oh. St. 343, 354; Grant *v.* Clay Co., 80 Pa. St. 208, 218; Myers *v.* Croft, 13 Wall. (U. S.) 291, 295; Casey *v.* Galli, 94 U. S. 673, 680; Close *v.* Glenwood Cemetery, 107 U. S. 466, 477; Andes *v.* Ely, 158 U. S. 312, 322; Wallace *v.* Hood, 89 Fed. 11, 20; Wells Co. *v.* Avon Mills, 118 Fed. 190, 194. Of these dicta, those entitled to most weight are in Williams *v* Bank of Michigan, 7 Wend. (N. Y.) 539, 542, and Com-

mercial Bank *v.* Pfeiffer, 108 N. Y. 242. See also Calkins *v.* Bump, 120 Mich. 335, 342; Rafferty *v.* Bank of Jersey City, 33 N. J. L. 368. And there are a few decisions the result of which necessarily involves the proposition that one who has contracted with the associates as a corporation is always estopped to defend on the ground that the associates were not authorized to act as a corporation. Blake *v.* Holley, 14 Ind. 383; Meikel *v.* German Soc., 16 Ind. 181; Hasselman *v.* U. S. Mortgage Co., 97 Ind. 365; Liverpool Co. *v.* Hunt, 11 La. Ann. 623; Franz *v.* Teutonia Ass'n, 24 Md. 259 (but see Boyce *v.* Church, 46 Md. 359); Farmers Co. *v.* Needles, 52 Mo. 17; Nat'l Ins. Co. *v.* Bowman, 60 Mo. 252; Studebaker Co. *v.* Montgomery, 74 Mo. 101.

Where the associates are acting under color of right, it is submitted that they should be permitted to sue, as a corporation, for a tort done to their property. See 20 HARV. L. REV. 469–71, and notes 24 and 25. This question has never received careful consideration by the courts. In Am. Trust Co. *v.* Minnesota Co., 157 Ill. 641, there is a dictum that the associates could not maintain any action, on the ground that there was no law under which such a corporation could have been legally formed.

Where the corporation *de facto* is not a party to the suit, and the only question is whether it might be a conduit of title, it is submitted that, if the associates were acting under color of right, their grantee or vendee should be protected. See 20 HARV. L. REV. 457, and note 2. This question has never received careful consideration by the courts. In Am. Trust Co. *v.* Minnesota Co., 157 Ill. 641 (no law), and Bradley *v.* Reppell, 133 Mo. 545 (expiration of charter), the grantee was not protected. But the language in Smith *v.* Sheeley, 12 Wall. (U. S.) 358, would support the opposite conclusion. See also Sherwood *v.* Alvis, 83 Ala. 115, 118; Brickley *v.* Edwards, 131 Ind. 3, 7; Reynolds *v.* Myers, 51 Vt. 444, 445; County of Leavenworth *v.* Barnes, 94 U. S. 70.

Where the associates are sued as a corporation, the courts are very slow to permit them to set up their lack of authority to act as a corporation. See McDonnell *v.* Alabama Ins. Co., 85 Ala. 401 (no law); Racine Co. *v.* Farmers' Trust Co., 49 Ill. 331, 344 (no law); McCarthy *v.* Lavasche, 89 Ill. 270 (no law); Dows *v.* Naper, 91 Ill. 44 (no law); Shadford *v.* Detroit Ry., 130 Mich. 300 (no law); Gardner *v.* Minneapolis Co., 73 Minn. 517 (no law); Latimer *v.* Bard, 76 Fed. 536 (fraud); Miller *v.* Coal Co., 31 W. Va. 836 (charter expired; tort to employee. *Cf.* Knights of Pythias *v.* Weller, 93 Va. 605); U. S. Express Co. *v.* Bedbury, 34 Ill. 459 (naked assumption); Johnson *v.* Corser, 34 Minn. 355, 358 (naked assumption); Perine *v.* Grand Lodge, 48 Minn. 82 (naked assumption); Corey & Co. *v.* Morrill, 61 Vt. 598 (naked assumption). See also Dooley *v.* Cheshire Glass Co, 15 Gray (Mass.) 404; Hassinger *v.* Ammon, 160 Pa. St. 245; Casey *v.* Galli, 94 U. S. 673. *Cf.* Pittsburg Co. *v.* Beale, 204 Pa. St. 85.